BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANGELA R. LUGINBILL	)	
Claimant	)	
	)	
VS.	)	
	)	
RISK MANAGEMENT ALTERNATIVE	)	
Respondent	)	Docket No. 1,011,148
	)	
AND	)	
	)	
KEMPER INSURANCE COMPANIES	)	
PENNSYLVANIA MANUFACTURING INS. CO.	)	
Insurance Carriers	)	

ORDER

Respondent and insurance carrier Kemper Insurance Companies requested review of the October 14, 2004 Award by Administrative Law Judge (ALJ) Steven J. Howard. The Board heard oral argument on March 29, 2005.

APPEARANCES

Robert W. Harris, of Kansas City, Kansas, appeared for the claimant. Michelle Daum Haskins, of Kansas City, Missouri, appeared for respondent and its insurance carrier Kemper Insurance Companies (Kemper). Elizabeth Dobson, of Kansas City, Kansas, appeared for respondent and insurance carrier Pennsylvania Manufacturing Insurance Company (Pennsylvania).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties stipulated that there is no dispute as to the nature and extent of claimant's impairment and that assuming any of Kemper's defenses are not applicable, the ALJ's Award of 12 percent functional impairment is appropriate. The parties further agreed there is no dispute on the amount of temporary total disability benefits awarded by the ALJ, nor that the applicable date of accident for purposes of this claim is December 2, 2002, claimant's last date worked for respondent.

ISSUES

Following a regular hearing, the ALJ expressly rejected Kemper's assertion that claimant's claim is barred by the terms of a previous workers compensation settlement entered into between the parties on March 10, 2003. According to the ALJ's Award, the earlier settlement made no determination regarding claimant's upper extremity complaints for which she had been receiving treatment at respondent's expense, and which are the focus of this claim. Thus, even though claimant conceded she was accepting a lump sum payment as a "final and complete compromise of all issues and all claims for workers compensation benefits"[1] that she had as of the date of the settlement, the ALJ concluded her claim for bilateral carpal tunnel complaints survived that settlement and remained actionable. He reasoned that "[t]o hold otherwise, would be a miscarriage of justice for claimant not receiving the disability payments for the injuries sustained to her upper extremities."[2]

The ALJ went on to enter an Award granting claimant a 12 percent whole body permanent partial impairment for her bilateral carpal tunnel complaints. The ALJ concluded claimant's date of accident was December 2, 2002, the date she last worked for respondent, and that by virtue of providing treatment to claimant for her left wrist complaints, notice was established.

In light of the parties' stipulation regarding the identity of each of the respondent's insurance carriers and their respective dates of coverage, the entirety of the Award was assessed against respondent and its carrier as of December 2, 2002, Kemper. The ALJ further directed Kemper to reimburse the private health insurance carrier for those expenses it paid in connection with claimant's bilateral carpal tunnel surgeries, and to hold claimant harmless for any bills associated with that care.

Finally, the ALJ's Award granted Pennsylvania's request for reimbursement of those funds it paid pursuant to an earlier preliminary hearing order. However, the Award neglected to identify the basis for this reimbursement, or the entity that was responsible for the reimbursement, although presumably it would be Kemper.[3]

Respondent and Kemper appeal this Award contending that the ALJ erred in a number of respects. First, Kemper argues that the settlement effectuated on March 10, 2003 fully extinguished the present claim. During that settlement hearing, claimant, who

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[1] P.H. Trans., Resp. Ex. A at 6.

[2] ALJ Award (Oct. 14, 2004) at 4.

[3] The Board has held that in cases of trauma where there is a series of accident dates, generally the insurance carrier on the risk at the time medical treatment is obtained or preliminary benefit is provided is responsible for the payment even if that carrier was not on the risk at the time of the ending date of the series.

was represented by counsel, was advised that any and all claims she had as of the day of the settlement were concluded by her acceptance of the $3,000 settlement payment. Kemper maintains that claimant had consistently testified that her upper extremity complaints, particularly the left wrist, began shortly after her July 22, 2002 work-related accident in the elevator. Therefore, it is reasonable for respondent and its carrier, Kemper, to believe that the settlement concluded any issues involving those complaints. Moreover, claimant made no effort to exclude her upper extremity complaints from the terms of the March 10, 2002 settlement and instead, accepted the settlement proceeds willingly. Only when her complaints increased, several months later, did she file a separate claim against respondent. For these reasons, Kemper believes the previous settlement bars claimant from proceeding in this matter. As such, Kemper is entitled to reimbursement from the Kansas Workers' Compensation Fund under K.S.A. 44-534a and 44-556.

Alternatively, respondent and Kemper argue that claimant failed to sufficiently establish that she sustained an accident over a series of dates, culminating on December 2, 2002, and that she failed to provide timely notice of that injury as required by K.S.A. 44-520.

As for the reimbursement issue, Kemper disputes to the ALJ's authority to order payments to be made to a non-party in this litigation. Second, Kemper challenges the ALJ's authority to order it to reimburse Pennsylvania for monies it paid pursuant to the ALJ's preliminary hearing Order. Kemper maintains there is no statutory authority which empowers the ALJ to order any such reimbursement between carriers. Rather, Kemper maintains Pennsylvania's recourse is against the Fund under K.S.A. 44-534a and 44-556.

Pennsylvania takes no stand in this appeal other than to maintain its presence for purpose of reimbursement and ask the Board to affirm the ALJ's Order.

Claimant contends the ALJ's Award should be affirmed in all respects. She argues that the claim she settled in March 2003 stemmed from a wholly independent accident and related solely to injuries she sustained to her back and neck, not from the bilateral carpal tunnel condition that developed in the weeks and months after that accident while she continued to work for respondent performing repetitive activities. Any payments made in that settlement were solely related to her neck and back injury and not to the physical problems represented in this claim.

Claimant further argues that respondent and its carrier, Kemper, had actual knowledge of her left hand complaints and were providing treatment for those complaints and honoring the physician-imposed restrictions. Thus, the notice required by K.S.A. 44-520 is met. Claimant also states that the ALJ has the authority to order reimbursement to her health carrier under K.S.A. 44-510j(h).

The issues to be addressed are as follows:

1. Whether claimant's March 10, 2003 settlement in Docket No. 1,005,512 extinguished the claim asserted here in Docket No. 1,022,148;

2. Whether claimant sustained accidental injury arising out of and in the course of her employment with respondent;

3. Whether claimant gave timely notice of her alleged repetitive injury claim which is deemed to have occurred on December 2, 2002;

4. Whether the ALJ had the authority to order Kemper to reimburse claimant's private health carrier for expenses incurred in connection with treatment for claimant's bilateral carpal tunnel condition; and

5. Whether and by what mechanism is respondent's carrier, Pennsylvania, is entitled to reimbursement for payments it made pursuant to a preliminary hearing Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant began her employment with respondent in November of 2001. She was hired to work as a collector, making several hundred phone calls during an eight-hour shift constantly inputting information, as needed, into a computer. In July of 2002, she was riding in an elevator while at work for respondent when she fell. This was accepted as a compensable injury and treatment was provided. She also filed a workers compensation claim.[4] During treatment for what she alleged were low back and neck injuries, she also voiced complaints about her left hand, specifically her left wrist and thumb. Claimant was initially treated at an occupational facility and eventually referred to Dr. Brad Storm for an evaluation.

Dr. Storm examined claimant and performed some diagnostic tests. On October 31, 2002, he concluded that she might have some nerve compression, but that the tests were all essentially normal. He advised claimant that these were "functional symptoms without any basis in some sort of anatomic, work-related injury."[5] He recommended she stay on full work duty and offered her a night splint, simply as a preventative measure.

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[4] Docket No. 1,005,512.

[5] P.H. Trans., Cl. Ex. 1 at 2.

Claimant continued working although she had non-medical, personal issues that required her to seek time off in November, 2002. Then in December 2002, she had an unrelated health issue that required her to be hospitalized for a period of days. The parties have agreed that claimant's last date of work was December 2, 2002.

On March 10, 2003, a settlement hearing was held in Docket No. 1,005,512. During the settlement hearing, at which she was represented by an attorney, claimant was awarded $3,000 on a full compromise of all issues. The Special ALJ specifically asked claimant if she was aware that the settlement was intended to legally conclude all claims for personal injury arising out of her employment with respondent. Claimant indicated that she understood this. She further acknowledged that she was electing to compromise her claim and settle it, "close[ing] it out completely."[6] The recitation by the Special ALJ reveals a finding that the proposed settlement was in claimant's best interest and that the lump sum of $3,000 was intended as a "full, final and complete compromise of all issues and all claims for worker's compensation benefits that the claimant has in this matter."[7]

The record of that proceeding, including the exhibits, make it clear that claimant made no mention of her upper extremity complaints or the treatment she had received at respondent's expense. At her lawyer's direction, claimant was evaluated by Dr. Edward J. Prostic in November 2002. A review of Dr. Prostic's report, which is attached to the settlement transcript, reveals no mention of any upper extremity complaints or treatment, although it is undisputed that claimant had, by this time, been seen by Dr. Margaret Rice, a physician at a local occupational facility, for left hand complaints as early as mid-September 2002. Dr. Rice's report dated August 26, 2002 indicated she believed there was no permanency resulting from the July 22, 2002 accident and resulting cervical injury. This report is also attached to the transcript of the settlement hearing. Claimant had also been seen by Dr. Storm, but his report from October 31, 2002 was not attached to the transcript, although it is presently in the record. Dr. Storm's report indicates claimant's complaints are not causally related to work.

At the regular hearing, claimant testified that she believed respondent knew she was having problems with her upper extremities as respondent was providing her with treatment. The medical records suggest that she was given work restrictions which respondent honored.[8] However, she also testified her attorney did not know of her hand complaints,[9] and Dr. Prostic's report makes no mention of left or right wrist or hand complaints.

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[6] *Id.*, Resp. Ex. A at 5.

[7] *Id.*, Resp. Ex. A at 6.

[8] *Id.*, Ex. B.

[9] R.H. Trans. at 15.

After settling her claim in March 2003, claimant sought treatment in May 2003 from Dr. Joel Lane, who diagnosed bilateral carpal tunnel complaints which, according to his notes, have been present for the past several years. He recommended surgery to both wrists and took her off work. The first procedure, a right carpal tunnel release, was done on June 3, 2003 to her right hand. Her left hand was likewise done in August of 2003.

On June 19, 2003, Claimant filed a written claim for workers compensation benefits against respondent. The parties have agreed that December 2, 2002 was claimant's last day of work and to the extent claimant sustained a compensable injury as a result of a series of accidents, that date is considered to be the date of accident for purposes of this claim.

The ALJ concluded that the settlement entered into in March 2003 does not bar the pending claim. The Board has considered this ruling and finds that it should be reversed. The language employed by the respondent's counsel during the settlement hearing, without any objection by claimant or her counsel, reflects an intent to effectuate an all-inclusive settlement, barring any and all claims that claimant might have possessed at the time of the settlement. Respondent's counsel recited the following:

> The settlement is intended to legally conclude all claims for personal injury arising out of the claimant's employment as of the date of this Settlement Hearing.[10]

When asked if this was her understanding, claimant indicated that it was and that she had discussed the matter with her lawyer, Mr. Wallace, and that it was her election to "settle and close it out completely".[11]

At no time during that settlement hearing did claimant ever express any question or concern about the extent of the awarded settlement, nor did she appeal it. Although the settlement mentions a functional impairment figure and obviously makes no mention of any hand complaints or permanency to that body part, she clearly had received treatment to that extremity and she, better than anyone, knew of the problem. The fact that she believed her upper extremity complaints were attributable to the June 2002 accident, and that she went ahead with the settlement, voluntarily concluding all of her claims, lends credence to respondent's argument that the present claim is extinguished. Had claimant believed she had a repetitive injury claim stemming from her daily work activities rather than the June 2002 accident, she could merely have spoken up or her attorney could have made that exception on the record, thereby preserving or excluding her repetitive injury claim from the settlement, much like was attempted in *Bernard*.[12] In that case, the Board concluded that

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[10] P.H. Trans., Resp. Ex. A. at 4.

[11] *Id.* at 5.

[12] *Bernard v. R. Vickers Trucking, Inc.*, No. 223,984, 1998 WL 51325 (Kan. WCAB Jan. 26, 1998).

because the testimony, medical reports and the Form 12 worksheet all mentioned only a September 7, 1995 accident, the general language included by the respondent to the effect that the settlement was intended to settle "all claims to date" did not extinguish the settling employee's separate docketed claim for a separate accident.[13]

The facts in the instant action are distinguishable from that present in *Bernard*. Here, claimant continued to attribute her upper extremity complaints to her June 2002 accident, although she failed to disclose that belief to Dr. Prostic, the physician her lawyer retained to examine and rate her for purposes of litigating and/or settling her June 2002 claim. There was no other docketed case pending in March 2003 when claimant settled her claim in Docket No. 1005,512. She filed no other action against her employer until 6 months after she last worked for respondent. Only then did she assert a repetitive injury claim for injuries sustained up to December 2, 2002, her last date worked for respondent.

The law favors contracts in settlement of disputed matters and avoidance of litigation.[14] However, the Board recognizes that the Division of Workers' Compensation settlement procedure is not intended to provide blanket approval of claims, thus releasing employers from liability, without an independent appraisal by either an administrative law judge or a special administrative law judge to determine whether the settlement is in the claimant's best interests.[15] Here, this was done. The Special Administrative Law Judge made such a finding.[16]

The Board finds that under these facts and circumstances, the full, final and complete settlement entered into on March 10, 2003 under Docket No. 1,005,512 encompassed the injury asserted in this claim. Accordingly, claimant's claim is barred.

Additionally and independent of the foregoing analysis, the Board also finds that the claimant failed to give timely notice of her repetitive injury claim. K.S.A. 44-520 provides:

> **Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any

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[13] *Id.*

[14] *Reynard v. Bradshaw*, 196 Kan. 97, 409 P.2d 1011 (1966).

[15] See K.S.A. 44-531; see also *Cockerham v. Nichols Fluid Service, Inc.*, No. 201,867, 1999 WL 382900 (Kan. WCAB May 5, 1999).

[16] P.H. Trans., Resp. Ex. A. at 6.

> proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Here, the parties agreed claimant's last date of work was December 2, 2002. Although claimant had, before that date, articulated left hand complaints, she attributed those complaints to her July 2002 accident. Respondent provided a medical evaluation and those complaints were ruled out as having any causal relationship to her work activities. Even claimant's own examining physician, Dr. Prostic, failed to make any mention of those complaints.

Only after leaving respondent's employ and after the passage of nearly six months did claimant seek treatment for what was then a bilateral condition. Then, on June 19, 2003, she filed a written claim against respondent for her repetitive series of injuries. This was the first notice respondent received of claimant's alleged bilateral hand condition. Obviously, this notice was far after the 10 or 75 days contemplated by the statute. Up to that point in time, although claimant had complained of left hand complaints in connection with her July 2002 back injury, that claim had been resolved by a settlement in March 2003 and claimant had last worked for respondent. Respondent had no knowledge, actual or otherwise, of a bilateral hand condition related to claimant's repetitious work, culminating on December 2, 2002, until this claim was filed on June 19, 2003.

Based upon this record, the Board finds that claimant failed to give the timely notice required by the statute. Accordingly, her claim must fail. Respondent and its carrier, Kemper, are therefore entitled to apply for reimbursement from the Kansas Workers Compensation Fund under K.S.A. 44-534a(b). Pennsylvania is likewise entitled to apply for reimbursement for those funds it paid pursuant to the ALJ's preliminary hearing Order.

Given the Board's finding with regard to the settlement and notice, all the remaining issues are moot.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated October 14, 2004, is reversed and all benefits are denied.

IT IS SO ORDERED.

Dated this _____ day of April, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENTING AND CONCURRING OPINION

I agree with the majority that claimant failed to prove timely notice. But I believe the March 10, 2003 settlement hearing does not preclude the present claim as there was not a meeting-of-the-minds. According to the principles stated in Bernard and Cockerham, both cited above, the general boiler plate language to extinguish all claims should not be construed to apply to those accidents that are not specifically mentioned in the settlement worksheet, medical records required for settlement, or addressed during the settlement hearing.

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BOARD MEMBER

c: Robert W. Harris, Attorney for Claimant
Michelle Daum Haskins, Attorney for Resp. and its Ins. Carrier (Kemper)
Elizabeth Dodson, Attorney for Resp. and its Ins. Carrier (Pennsylvania)
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director